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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN JOSEPH KAULICK,

Defendant and Appellant.

B285815

Los Angeles County

Super. Ct. No. PA034177

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

This is defendant Steven Joseph Kaulick's second appeal arising out of his petition for resentencing of his three strikes conviction (Pen. Code,¹ § 1170.126, enacted as part of the Three Strikes Reform Act (Proposition 36)). (See *People v. Kaulick* (Jan. 4, 2017, B265040 [nonpub.]) (*Kaulick I.*) In *Kaulick I.*, we reversed the trial court's order denying Kaulick's petition for resentencing after concluding the court erred in applying a "preponderance of the evidence," as opposed to a "beyond a reasonable doubt," standard of proof to find Kaulick intended to inflict great bodily injury during his third-strike offense, a finding that rendered him ineligible for resentencing under Proposition 36. We remanded the matter to allow the court to apply the correct standard of proof in determining whether Kaulick was eligible for resentencing.

On remand, the court found beyond a reasonable doubt that Kaulick intended to inflict great bodily injury on the victim of his third-strike offense and again denied Kaulick's petition for resentencing. On appeal, Kaulick contends: (1) insufficient evidence supports the court's finding that he intended to inflict great bodily injury during his third-strike offense; (2) the court violated his Sixth Amendment rights when it found he intended to inflict great bodily injury, a finding that was not established by virtue of his underlying third-strike conviction; and (3) the court violated his Sixth Amendment right to a jury trial by making a factual finding that he claims "increased the penalty to which he was subjected." We affirm.

¹ All undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

1. Kaulick's Third-Strike Offense

In September 1999, Kaulick attacked his 18-year-old neighbor (victim). The victim was outside Kaulick's apartment when she heard him screaming at someone over the telephone. When the victim asked Kaulick if he was okay, he told her that he was getting a divorce and moving out of his apartment. The victim then offered to help Kaulick move.

After the victim entered Kaulick's apartment, Kaulick grabbed her, tore her blouse, and placed his hand over her mouth. Kaulick then began choking the victim and telling her to "shut up." As the victim struggled to leave the apartment, Kaulick grabbed her by her hair, started choking her again, and told her that he would kill her.

Kaulick then dragged the victim across the room to his bed, threw her on it, and straddled her. As Kaulick held the victim down and began taking off his belt, the victim kicked him in his crotch, fled the apartment, and called the police.

The officer who examined the victim after the attack observed that she had redness on both sides of her neck and a scratch mark or handprint on her left arm. The victim described her injuries as "[n]othing but scratches and red marks." Specifically, she stated she had "red marks on [her] throat ... [and] a scratch on [her] chin that didn't go away for a couple days" The victim refused medical attention.

The People charged Kaulick with false imprisonment by violence (§ 236, count 1), assault with intent to commit rape (§ 220, count 2), and making criminal threats (§ 422, count 3). (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1287 (*Kaulick*).) The People alleged Kaulick had suffered two prior convictions for kidnapping, both of which are serious or

violent felonies under the Three Strikes law (§§ 667.5 & 1170.12). (*Kaulick*, at p. 1287.) The People further alleged one prior strike (§ 667, subd. (a)(1)) and two prior prison term enhancement allegations (§ 667.5, subd. (b)). (*Kaulick*, at p. 1287.)

In 2000, a jury convicted Kaulick of false imprisonment by violence. (*Kaulick, supra*, 215 Cal.App.4th at p. 1287–1288.) The jury did not, however, reach verdicts as to the assault and criminal threats charges, and the court declared a mistrial as to those counts. (*Ibid.*) At a bifurcated bench trial, the court found true all of the prior conviction and prior prison term allegations. (*Id.* at p. 1288.)

The court sentenced Kaulick to a term of 25 years to life for the false imprisonment offense under the Three Strikes law, and it imposed an additional one-year term for one of the prior prison term enhancement allegations. (*Kaulick, supra*, 215 Cal.App.4th at p. 1288.) After pronouncing sentence, the court dismissed counts 2 and 3. (*Ibid.*)

2. Initial Proposition 36 Proceedings and Kaulick’s First Appeal

In December 2012, Kaulick filed a petition for resentencing of his third-strike conviction under Proposition 36. In 2015, the court denied Kaulick’s petition, finding he was ineligible for resentencing under Proposition 36 because he intended to inflict great bodily injury on the victim of his third-strike offense.

Kaulick filed a timely appeal from the court’s 2015 order. In that appeal, Kaulick argued: “(1) the court violated his Sixth Amendment right to a jury trial by making a factual finding that he intended to commit great bodily injury during his third-strike offense, a finding which rendered him ineligible for resentencing; and (2) the court applied the incorrect standard of proof in making its eligibility determination.”

In January 2017, we issued *Kaulick I*, reversing the court’s 2015 order denying Kaulick’s petition for resentencing. Although we rejected Kaulick’s argument that the court violated his Sixth Amendment right to a jury trial when it found he was ineligible for resentencing, we determined the court applied the incorrect standard of proof when it found Kaulick intended to inflict great bodily injury on the victim of his third-strike offense. Relying on our prior decision in *People v. Arevalo* (2016) 244 Cal.App.4th 836, we concluded the court should have applied a “beyond a reasonable doubt,” as opposed to a “preponderance of the evidence,” standard when making a factual determination that rendered Kaulick ineligible for resentencing under Proposition 36. Because we could not conclude the court’s application of the incorrect standard of proof was harmless, we reversed the 2015 order denying Kaulick’s petition for resentencing and remanded the matter to allow the court to make a new eligibility determination applying the beyond a reasonable doubt standard of proof.

3. Proposition 36 Proceedings Following *Kaulick I*

On July 10, 2017, after we issued our opinion in *Kaulick I*, the court held a new eligibility hearing. After hearing argument from both parties, the court issued a written statement of decision on October 12, 2017, denying Kaulick’s petition for resentencing. The court concluded Kaulick was ineligible for resentencing after finding beyond a reasonable doubt that he intended to inflict great bodily injury on the victim of his third-strike offense.

Kaulick filed a timely appeal from the October 12, 2017 order denying his petition for resentencing.

DISCUSSION

1. Applicable Law and Standard of Review

“[U]nder the original [Three Strikes] law, a defendant previously convicted of two qualifying strikes was subject to a life term if he was subsequently convicted of *any* new felony, regardless of whether it was a serious or violent one.” (*People v. Frierson* (2017) 4 Cal.5th 225, 230 (*Frierson*).) Proposition 36, however, changed the sentence prescribed for a third-strike defendant whose current offense is not a serious or violent felony. (*Ibid.*) Under Proposition 36, a third-strike defendant whose current offense is not a serious or violent felony would be sentenced as a second-strike offender, unless an exception that renders the defendant ineligible for sentencing under Proposition 36’s ameliorative penalty provisions applies. (*Ibid.*) Proposition 36 requires the prosecution to prove and plead a disqualifying exception. (§ 1170.12, subd. (c)(2)(C).)

Proposition 36 also allows defendants already serving a life term for a third-strike to petition for resentencing. (§ 1170.126, subd. (b).) A defendant is eligible for resentencing under Proposition 36 only if he is serving a life term for felonies that are not serious or violent. (§ 1170.126, subd. (e)(1).) In addition, a defendant may be rendered ineligible for resentencing by a number of disqualifying factors. For example, a defendant is ineligible for resentencing if “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§ 667, subd. (e)(2)(C)(iii); see § 1170.126, subd. (e)(2).) “ [T]he petitioning defendant has the *initial* burden of establishing eligibility, and if that burden is met, then the prosecution has the opportunity to establish

ineligibility on other grounds.’ [Citation.]” (*Frierson, supra*, 4 Cal.5th at p. 234.)

After we issued *Kaulick I*, the California Supreme Court decided *Frierson*, in which it held the prosecution must prove beyond a reasonable doubt that a defendant is ineligible for resentencing under Proposition 36. (*Frierson, supra*, 4 Cal.4th at pp. 234–236.) The prosecution may do so either by proving the defendant’s third-strike offense constitutes a serious or violent felony or by establishing the defendant engaged in disqualifying conduct during the commission of that offense. (*Ibid.*)

We review a trial court’s finding that a defendant is ineligible for resentencing for substantial evidence. (*People v. Perez* (2018) 4 Cal.5th 1055, 1059 (*Perez*).) We examine the entire record in the light most favorable to the People, resolving all conflicts in the evidence and drawing all reasonable inferences in support of the court’s order. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) We apply this standard whether direct or circumstantial evidence is involved. (*People v. Avila* (2009) 46 Cal.4th 680, 701.) Therefore, before we may set aside the court’s eligibility determination, it must be clear that “ ‘ “upon no hypothesis whatever is there sufficient evidence to support [it].” ’ ” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

2. Substantial evidence supports the court’s finding that Kaulick intended to commit great bodily injury.

Kaulick contends insufficient evidence supports the court’s finding that he intended to inflict great bodily injury on the victim of his third-strike offense, false imprisonment by violence. We disagree.

“Great bodily injury” is defined as “a significant or substantial physical injury.” (§ 12022.7, subd. (f).) “This definition does not require that the victim suffer ‘ “permanent,”

“prolonged,” or “protracted” disfigurement, impairment, or loss of bodily function.’ [Citation.]” (*People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755.) Generally, lacerations, bruises, abrasions or a loss of consciousness are sufficient for a finding of “‘great bodily injury.’” (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047–1048 [lacerations, bruises or abrasion]; *People v. Wade* (2012) 204 Cal.App.4th 1142, 1149 (*Wade*) [loss of consciousness].) Further, it is not necessary to show the victim’s injuries required medical treatment to establish the existence of great bodily injury. (*Wade*, at p. 1149.) The intent to inflict great bodily injury “may be inferred from the circumstances attending the act, including the manner in which the act was done and the means used.” (*People v. Phillips* (1989) 208 Cal.App.3d 1120, 1124 (*Phillips*).)

Substantial evidence supports the court’s finding that Kaulick intended to inflict great bodily injury on the victim when he committed false imprisonment by violence. The victim testified that immediately after she entered his apartment, Kaulick grabbed her, covered her mouth, and started strangling her. According to the victim, Kaulick dug his fingers “deep” into her throat with one of his hands while he used the other hand to squeeze the back of her neck. The victim couldn’t breathe while Kaulick had his hands around her neck. Although the victim tried to break free from Kaulick several times, he repeatedly pulled her back to him so he could continue to strangle her. The victim testified that after her second attempt to break free from Kaulick, he had “his fingers in [her] throat very hard,” and that after she looked him in the face, he started “strangling [her] even harder,” to the point where she “completely just start[ed] to los[e] consciousness.” Even as the victim started to lose consciousness, Kaulick continued to strangle her. This evidence amply supports a finding that Kaulick intended to inflict great bodily injury on

his victim—that is, that he intended to cause her to lose consciousness by strangulation. (See *Wade, supra*, 204 Cal.App.4th at p. 1149.)

Kaulick argues the court erred in finding he intended to inflict great injury because the victim never passed out or suffered any prolonged injuries, and he never “struck” her during the attack, even though “he was certainly in a position to have done so had he been so inclined.” The fact that Kaulick did not engage in additional forms of violence during the attack, or that the victim may not have completely lost consciousness or suffered any prolonged injuries as a result of the attack, does not mean there is insufficient evidence to support a finding that he *intended* to inflict great bodily injury on the victim. The manner in which Kaulick carried out the attack—his repeated attempts to strangle her, the fact that he increased the amount of force he used to strangle her as the attack progressed, and his threats to kill her—clearly supports a finding that he intended to inflict great bodily injury on the victim. (See *Phillips, supra*, 208 Cal.App.3d at p. 1124.)

3. The trial court’s eligibility determination did not violate Kaulick’s Sixth Amendment rights.

Kaulick next contends the court violated his Sixth Amendment rights when it found he intended to inflict great bodily injury on the victim of his third-strike offense, a finding that rendered him ineligible for resentencing under Proposition 36. Kaulick argues the court’s eligibility finding violated his Sixth Amendment rights because “the court relied on judicial fact-finding beyond the elements of the [underlying] conviction.” Kaulick also argues the court violated his Sixth Amendment right to a jury trial when it found he was ineligible for resentencing because the court, rather than a jury, made a

factual finding that Kaulick claims increased the penalty to which he was subjected, the same argument he raised in *Kaulick I*. We reject both of these arguments.

Kaulick's third-strike offense is false imprisonment by violence. To convict Kaulick of that crime, the prosecution needed to prove: (1) Kaulick intentionally restrained his victim by violence or menace; and (2) Kaulick restrained the victim against her will. (*People v. Williams* (2017) 7 Cal.App.5th 644, 672.) "Violence is ' ' ' 'the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint.' ' ' ' [Citation.]" (*Ibid.*)

Notably, the prosecution was not required to prove that Kaulick intended to inflict great bodily injury on his victim to convict him of false imprisonment by violence. The prosecution also did not allege any allegations or enhancements that required them to prove such conduct. Accordingly, when Kaulick was convicted of his third-strike offense, the jury never made a finding that he intended to inflict great bodily injury on his victim. In other words, that Kaulick intended to commit great bodily injury during his third-strike offense is not a fact established by Kaulick's judgment of conviction. Thus, when the trial court reviewed Kaulick's resentencing petition, it could not determine from the face of the judgment whether Kaulick intended to inflict great bodily injury on his victim during the commission of his third-strike offense. Rather, the court had to conduct its own examination of the record from that case to determine beyond a reasonable doubt whether Kaulick intended to inflict great bodily injury. The court's finding did not violate Kaulick's Sixth Amendment rights.

With respect to Kaulick's claim that the court's finding violates the Sixth Amendment because that finding could not be established by the face of Kaulick's judgment of conviction for his

third-strike offense, that claim is foreclosed by *Perez* and *People v. Estrada* (2017) 3 Cal.5th 661 (*Estrada*). In *Estrada*, the Supreme Court held that a trial court, in determining whether a defendant is ineligible for resentencing based on one of the disqualifying factors identified in sections 667, subdivision (e)(2)(C)(iii) and 1170.126, subdivision (e)(2), is not limited to facts necessarily established by the defendant's judgment of conviction. (*Estrada*, at pp. 672–673.) Instead, when determining whether a defendant is eligible for resentencing, the court may “consider[] conduct beyond that implied by the judgment.” (*Id.* at p. 671.) Although the court in *Estrada* did not base its decision on constitutional grounds, the court later held in *Perez* that a trial court's reliance on conduct beyond that implied by the judgment in determining eligibility for resentencing under Proposition 36 does not violate a defendant's Sixth Amendment right to a jury trial. (*Perez, supra*, 4 Cal.5th at pp. 1059, 1063 [acknowledging *Estrada* did not address a defendant's Sixth Amendment rights but “now hold[ing] that the Sixth Amendment does not bar a trial court from considering facts not found by a jury beyond a reasonable doubt when determining the applicability of a resentencing ineligibility criterion under Proposition 36”].) The court, therefore, did not violate Kaulick's Sixth Amendment rights when it based its eligibility determination on facts that were not established by the face of the judgment of conviction for his third-strike offense.

The court also did not violate Kaulick's right to a jury trial when it, and not a jury, made a factual finding that rendered him ineligible to obtain a reduced sentence under Proposition 36. “Under the Sixth Amendment, any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” (*Perez, supra*, 4 Cal.5th at p. 1063,

citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Alleyne v. United States* (2013) 570 U.S. 99.) As the California Supreme Court recognized in *Perez*, however, “a factual finding that results in resentencing ineligibility does not increase the petitioner’s sentence; it simply leaves the original sentence intact.” (*Perez*, *supra*, 4 Cal.5th at p. 1064; see also *Dillon v. United States* (2010) 560 U.S. 817 [a defendant does not have a Sixth Amendment right to have facts found by a jury beyond a reasonable doubt with respect to issues that limit the defendant’s ability to have his lawful sentence reduced].) Accordingly, Kaulick does not have a Sixth Amendment right to have a jury find facts that would determine his eligibility for resentencing under Proposition 36. (*Perez*, at p. 1064.)²

² In light of our conclusion that the court’s eligibility determination did not violate Kaulick’s Sixth Amendment right, we need not address the People’s argument that Kaulick’s claims are also precluded by the law of the case doctrine based on our opinion in *Kaulick I*.

DISPOSITION

The trial court's order denying Kaulick's resentencing petition is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.